178

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Supreme Court, U.S.
FILED

No. 10-840 DEC 22 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KANCHHI MAYA SHERPA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Petitioner
Kanchi Maya Sherpa

December 22, 2010

QUESTIONS PRESENTED FOR REVIEW

Did the United States Court of Appeals, Second Circuit, err in holding that the IJ properly employed the doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things) in upholding an adverse credibility determination, in contrast to the holding of the United States Court of Appeals, Seventh Circuit, in *Kadia v. Gonzalez,* 501 F.3d 817 (7th Cir. 2007), which condemned this maxim as an "absolutely false maxim of life"? *Kadia, supra,* 501 F.3d at 821, quoting 3A Wigmore, *Evidence in Trials at Common Law,* § 1008, p. 982 (James H. Chadbourn ed., rev. ed. 1970); see also, *United States v. Schimmel,* 943 F.3d 802, 808 (7th Cir. 1991); and in doing so, whether the Court violated the Petitioner's rights to due process under the Fifth Amendment of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties here and in the U.S. Court of Appeals for the Second Circuit are listed.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner is a natural person. There are no parent corporations or corporations that hold 10% or more of the stock of any entity in this case.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The September 22, 2010 opinion of the United States Court of Appeals for the Second Circuit is unreported, as is the September 23, 2009 opinion of the Board of Immigration Appeals.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered the judgment sought to be reviewed on September 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). Pursuant to Rule 29.4 (a), notification will be made by service upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229a(c)

(7) Motions to reopen

(A) In general—An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents—The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general—Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum—There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

STATEMENT OF THE CASE

The Petitioner was a native and citizen of Nepal who came to the United States and within one year of her arrival, on January 7, 2003, filed her application for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) on Form I-589. On March 31, 2005, after hearings, a U.S. immigration judge (IJ) denied all such relief and ordered the Petitioner removed to Nepal. On November 6, 2006, the Board of Immigration Appeals (BIA) denied the Petitioner's appeal from the IJ's order. On June 15, 2007, the BIA denied the Petitioner's first motion to reopen as untimely. On March 13, 2008, the BIA denied the Petitioner's

second motion to reopen as untimely and time-barred.

On August 13, 2009, the Petitioner filed the Motion to Reopen that is the subject of this Petition. That Motion argued that there were changed country circumstances warranting reopening of this matter. That Motion was denied by the BIA on September 23, 2009. The Petitioner filed a Petition for Review of this Decision with the United States Court of Appeals for the Second Circuit. The Second Circuit denied the Petition on September 22, 2010. This Petition is being filed within 90 days of that decision.

REASONS FOR GRANTING THE PETITION

I.

BECAUSE THE COURT OF APPEALS INAPPROPRIATELY DISREGARDED THE PETITIONER'S PROFFERED EVIDENCE, THE PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED.

Here the Second Circuit rejected the Petitioner's showing of changed country conditions. The Court reasoned:

> Contrary to Sherpa's argument, the BIA properly relied on the immigration judge's underlying adverse credibility determination to reject her documentary evidence as insufficient to establish changed country condi-

> tions. *See Qin Wen Zheng v. Gonzales*, 500 F.3d 142, 147-48 (2d Cir. 2007). Indeed, the BIA reasonably applied the doctrine *falsus in uno, falsus in omnibus*, in rejecting Sherpa's unauthenticated and unreliable affidavits. *See Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007). Moreover, the record does not indicate that the BIA failed to consider any of the evidence Sherpa submitted.

Sherpa v. Holder, No. 09-4331-ag (Slip Op., p. 3).

The Petitioner had submitted a personal statement attesting that she was seeking reopening based on sought relief under the CAT, due to changed country conditions in Nepal and due to ineffective assistance of counsel in connection with her previous applications. The Petitioner claimed that her previous attorney did not submit any personal details about her husband's testimony, as he was supposed to do.

Her personal statement pointed out that Maoists were known in Nepal for a wide variety of inhuman tortures including rape, and that her family has received several recent visits from Maoists in which the Petitioner was menaced and threatened. Since the Maoists now control the government of Nepal, they were able to thwart the Petitioner's reasonable police complaints. The Petitioner's parents have been threatened with death if the Maoists' extortionate demands were not met. The Petitioner's personal statements showed that the Maoists had on December 1, 2007 broken down the

door of the house in which the Petitioner's parents lived, handcuffed the Petitioner's parents and injured them.

The Petitioner attached considerable objective evidence to the effect that the participation of the Maoists, who have established a reputation throughout Nepal for brutality and ruthless terror, in the government of Nepal has created a new danger of torture for the Petitioner, who was previously kidnapped and sexually assaulted and threatened by Maoists. The Petitioner submitted considerable evidence for the change of country conditions in Nepal, including her own affidavits and statement. The Court of Appeals rejected this evidence on the ground that the Board properly employed the device of "falsus in uno, falsus in omnibus," to reject the Petitioner's proffered new evidence, because she had a previous adverse credibility determination.

In *Kadia v. Gonzalez,* 501 F.3d 817 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit reasoned as follows:

> The immigration judge failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand. In effect, he applied the discredited doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things), which Wigmore called "primitive psychology," John H. Wigmore, *A Students' Textbook of the Law*

> *of Evidence* 181 (1935), and—in a characterization that we endorsed in *United States v. Schimmel*, 943 F.2d 802, 808 (7th Cir. 1991)—an "absolutely false maxim of life." 3A Wigmore, *Evidence in Trials at Common Law*, § 1008, p. 982 (James H. Chadbourn ed., rev. ed. 1970); see also *Yongo v. INS*, 355 F.3d 27, 33 (1st Cir. 2004); *United States v. Weinstein*, 452 F.2d 704, 713 (2d Cir. 1971) (Friendly, J.); *Virginian Ry. v. Armentrout*, 166 F.2d 400, 405 (4th Cir. 1948). Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment.

Kadia, supra, 501 F.3d at 821. Here, the Court of Appeals upheld the use of this discredited maxim to reject the entirety of the Petitioner's testimony, although it is undisputed that the Maoists are now part of the Nepali government, and the penchant of the Maoists for torture and tendency towards extortion are well-documented facts. This invalidation of the entire showing of the Petitioner, Petitioner submits, was improper and unreasonable, and thus violative of the Petitioner's due process right.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Khagendra Gharti-Chhetry
Chhetry & Associates
363 Seventh Avenue, Suite 1500
New York, New York 10001
(212) 947-1072

APPENDIX

09-4331-ag BIA
Sherpa v. Holder A098 228 768

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of September, two thousand ten.

PRESENT: DENNIS JACOBS,
Chief Judge,

GUIDO CALABRESI,
DEBRA ANN LIVINGSTON,
Circuit Judges.

No. 09-4331-ag

[Oval Stamp:
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED SEP 23 2010
Catherine O'Hagan Wolfe, CLERK]

KANCHHI MAYA SHERPA
A.K.A. KANCHI MAYA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

FOR PETITIONER:

Khagendra Gharti-Chhetry, New York, New York.

FOR RESPONDENT:

Tony West, Assistant Attorney General; Jennifer J. Keeney, Senior Litigation Counsel; Karen L. Melnik, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Kanchhi Maya Sherpa, a native and citizen of Nepal, seeks review of a September 23, 2009, order of the BIA denying her third motion to reopen. *In re Kanchhi Maya Sherpa*, No. A098 228 768 (B.I.A. Sept. 23, 2009). We assume the parties' familiarity with the underlying facts and procedural history of this case.

We review the BIA's denial of a motion to reopen for abuse of discretion. *Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam). An alien may only file one motion to reopen and must do so within 90 days of the final administrative decision. 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). However, there is no time or numerical limitations if the alien establishes materially "changed country conditions arising in the country of nationality." 8. U.S.C. § 1229a(c)(7)(C)(ii); *see also* 8 C.F.R. § 1003.2(c)(3)(ii). Here, Sherpa's third motion to reopen was indisputably untimely and number-barred. The BIA did not abuse its discretion in finding that she failed to establish changed country conditions excusing her untimely filing.

Contrary to Sherpa's argument, the BIA properly relied on the immigration judge's underlying adverse credibility determination to reject her documentary evidence as insufficient to establish changed country conditions. *See Qin Wen Zheng v. Gonzales*, 500 F.3d 142, 147-48 (2d Cir. 2007).

Indeed, the BIA reasonably applied the doctrine *falsus in uno, falsus in omnibus*, in rejecting Sherpa's unauthenticated and unreliable affidavits. *See Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007). Moreover, the record does not indicate that the BIA failed to consider any of the evidence Sherpa submitted. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34.1(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
[oval stamp]

[ROUND STAMP]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

SHERPA, KANCHHI MAYA
79 - 18 WOODSIDE AVE., #4E
ELMHURST, NY 11373

U.S. DHS/HAR
450 Main St, Room 483
Hartford, CT 06103-3060

Name: SHERPA, KANCHHI MAYA

A098-228-768

Date of this notice: 9/23/2009

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received

by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

/s/ DONNA CARR
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall-Clark, Molly

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A098 228 768 - Hartford, CT

Date: [STAMP]
SEP 23 2009

In re: KANCHHI MAYA SHERPA
a.k.a. Kanchi Maya

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Khagendra Gharti-Chhetry, Esquire

APPLICATION: Reconsideration and reopening

The respondent, a native and citizen of Nepal, has filed a motion pursuant to 8 C.F.R. § 1003.2. The motion requests reconsideration and reopening. 8 C.F.R. §§ 1003.2(b) and (c). Motions to reconsider must be filed within 90 days of the final order. 8 C.F.R. §§ 1003.2(b) and (c). Our final order in this matter was issued on November 6, 2006, when we dismissed the appeal of the May 31, 2005, Immigration Judge decision denying asylum, withholding, and protection under the Convention Against Torture (CAT). In that order, we also denied a motion to remand filed while the appeal was pending. On June 15, 2007, we denied a motion to reopen as untimely. On March 13, 2008, we denied an second motion to reopen as untimely and number barred. The instant

motion was filed on August 10, 2009. Therefore, insofar as it requests reconsideration of our last order, the motion is untimely.

The motion argues changed country conditions warranting an exception to the time and number limitations on motions to reopen. *See* Section 240(c)(7)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii).[1] The Department of Homeland Security (DHS) has not responded to the motion. The motion repeats arguments made earlier that the respondent fears harm from the Maoists in Nepal. The motion indicates that the respondent's parents have told that the Maoists have sent a warning letter as recent as April 2009 indicating that the respondent must be handed over to the organization if she returns to the country. Also, the motion indicates that, on March 23, 2009, the respondent's parents were questioned in their home about the respondent and the father was badly beaten.

In support, the motion proffers a letter purportedly from the respondent's parents, a letter from the Young Communist League Nepal, a letter from the Communist Party of Nepal, a letter from the Office of Village Development Committee as proof of the relationship between the respondent and her parents and further evidence of harm suffered, and medical documentation for a treatment of the

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1 Because the original asylum application was filed prior to May 11, 2005, it was not subject to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (Exh. 2). Any new claim presented in the instant motion would be subject to the REAL ID Act.

respondent's father (Motion at attachments 1-4). All of these documents post-date our most recent decision.

However, the documents submitted in support of this third motion to reopen are not authenticated and have little indicia of reliability, particularly in light of the adverse credibility finding made by the Immigration Judge in this case, and affirmed by this Board on appeal. *See Qin Wen Zheng v. Gonzales*, 500 F.3d 143 (2d Cir. 2007). The medical documentation, while indicative of injuries suffered by the father, does not indicate what or who caused the injuries (*Id.* at attachment 5).

The motion does not establish changed country conditions that would warrant an exception to the limitations on motions to reopen. *See* 8 C.F.R. § 1003.2(c); *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (the evidence presented with a motion to reopen must be sufficient to establish "that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case"). Accordingly, the following order will be entered

ORDER: The motion to reopen and reconsider is denied.

[s] Molly Kendall-Clark
FOR THE BOARD

BOARD OF IMMIGRATION APPEALS
US DEPARTMENT OF JUSTICE
5201 LEESBURG PIKE, SUITE 1300
FALL CHURCH, VIRGINIA 22041

MOTION TO REOPEN AND
RECONSIDER AND
NEW EVIDENCE AND
CHANCE OF COUNTRY CONDITION

In the matter of

SHERPA, KANCHHI MAYA
A 98-228-768

Respondent.

Kanchhi Maya Sherpa by her attorney, Khagendra Gharti-Chhetry of Chhetry & Associates, P.C. respectfully requests the BIA to reopen and reconsider this case, based on the reason as set forth below.

The Respondent is a native and citizen of Nepal came the United States and within on year of her arrival, on January 7, 2003, the Respondent filed I-589, Application for Asylum and for Withholding Removal, based on her fear to return to her native country due to persecution at the hands of Maoists.

Respondent respectfully requests the Board of Immigration Appeals to reopen this based on Convention Against Torture (CAT) due to changed Circumstance of Respondent's home country, Nepal

and based on new act of violence against the Respondent and her family.

On January 19, 2008, recently Respondent came to know about the detail of new acts of violence against the Respondent that was previously not available. The Maoist rebels are integral part of Nepalese Government, which also makes eligible to the Respondent for CAT claim.

In addition, the government has acquiesced the Maoist atrocities by ordering the security forces not take action against Maoists. See page 1 of the State Department Report on Nepal an Exhibit "A"

Changed of Country Condition

Respondent respectfully requests that this Board should reopen the proceeding based on changed of country condition in Nepal since the last proceeding in this matter, which affect her application for relief under the Convention Against Torture (CAT).

Presently, Maoists are directing and controlling government and ruling Respondent's country Nepal. The participation of the Maoists in the current government, clearly impacts the Respondent. The Maoists, whose record of torture is well documented, are now a part of the government. In Nepal the Respondent was kidnapped and sexually assaulted and threatened. Still, Respondent's parents are getting threat and physical harm from Maoists. The Maoists are known for inhuman torture, such as rape, chopping body parts, including physical torture of pouring hot water and severs beating and death by gradual infliction of bodily

pain. The Respondent has attached the proof of change of country conditions an Exhibit "B"

New Act of Violence

Respondent respectfully requests that this Board should reopen and reconsider the proceeding based on changed of new act of violence, which more it impossible for Respondent back to her native country, Nepal. Maoists came Respond parent's house and inquired about Respondent and gave a threading letter, they were beaten up with demand for donation to Respondent's parents.

On December 1, 2007, the members of Maoist came Respondent's parents house and asked about Respondent and her husband. They questioned to Respondent's parents. Maoists threaded to Respondent's parents saying that they are responsible for daughter and her husband otherwise they will kill Respondent's parents at their house. Maoists injured respondent's parents. Respondent's parents went to Police Station at Salleri, district of Solukhumbu. Since, the Maoists are participating government, the Police at Salleri did not respond properly and did not enforce their claim.

When the members of Maoist knew about Respondent and her husband have been staying in USA, they came Respondent parents' house and handcuffed and injured their faces. Maoists further threaded that Respondent parents have to provide Respondent and her husband to them otherwise parents had to pay 1200000.00 Rupees (Twelve Lakh) within a month. If Respondent parents were unable to provide Respondent and her husband to

them or pay donation within a month, they will kill Respondent's parents. After that Maoists' threaded Respondent's parents have moved to Kathmandu to hide from them.

The Respondent has attached the proof of new act of violence such as letter from Maoist to her and her parents.

Therefore, it is respectfully requested that the BIA reopen and reconsider this case and allow the Respondent to present this in the light of new act of violence and changed for country condition and further allow the Respondent to present evidence and testimony for relief under the Convention Against Torture remanding this case.

Date: 30th January 2008.

Respectfully submitted by:

/s/ Khagendra Gharti-Chhetry

Khagendra Gharti-Chhetry
Chhetry & Associates, P.C.
363 7th Avenue, Suite 1500
New York, NY 10001
212-947-1079

Affidavit of Kanchhi Maya Sherpa in Support of Motion to Reopen and Reconsider.
A 98-228-768

Kanchhi Maya Sherpa, under penalty of injury, duly affirms:

When I came to know that my prior attorney had failed to put information explaining how my husband, who was an unavailable witness at the time of hearing because he was not in the USA, would give a testimony here explaining the adverse credibility finding of the Judge. Also I was not told to provide a statement from husband to support my case. Further, my appeal was dismissed because the prior attorney failed to include about my husband's details statement regarding incident that my husband would provide. My case was denied for failure to show materiality of my husband's testimony. Therefore, I received ineffective assistance of counsel in this case. Now I have US born son who is on my breast-feeding and I want to reopen and reconsider my case.

I am seeking a relief of under CAT based on change of country condition in Nepal, where Maoists have been participated the government and I will be tortured upon my return to Nepal. In Nepal I was supporting with the Nepali Congress Party and Maoists had kidnapped and sexually assaulted me and threatened me. Maoists are known for inhuman torture, such as rape, chopping body parts, including physical tortures of pouring

hot water and server beating and death by gradual infliction of bodily pain.

Recently, the members of Maoist came our house for sever time and they asked about my husband and me. They question to my parents that where your daughter and son-in-law? They further said that where we escaped and stayed from them. They said that my parents have to tell them. The members of Maoist threaded to my parents saying that your responsibly to present my husband and me to them otherwise they will kill my parents at our house and they also injured my parents. Sever time, the members of Maoist are given to trouble to my parents and my parents went to Police Station at Salleri, district of Solukhumbu, since, the Maoist Party has been participated government the Police of Salleri did not respond properly and did not enforce their claim. My parents were very grief regards that matter. When the members of Maoist knew about my husband and me have been staying in USA. On December 1, 2007, around 10 pm 13 members of Maoist broke the front door of my parents' house and they handcuffed my parents and injured their faces. Members of Maoist further threaded that my parents have to present my husband and me to them otherwise pay 1200000.00 Rupees (Twelve Lakh) within a month, if my parents were unable to present my husband and me to them or pay donation within a month, they will kill my parents.

I has attached the proof of new act of violence such as Maoists threaten letter to me and my par-

ents. I also attached letter, which my parents sent to me mention about Maoists' act of violation.

I have attached the proof of change country condition and new act of violation that Maoists have come to the above statement I gave in Nepali was translated and read back to me in Nepali and it is true and correct.

/s/ Kanchhi Maya Sherpa
Kanchhi Maya Sherpa

Date: January 24, 2008

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Hartford, Connecticut

May 31, 2005

File No.: A 98 228 768

In the Matter of:

KANCHHI MAYA SHERPA
Respondent

IN REMOVAL PROCEEDINGS

CHARGE:	Section 237(a)(1)(B) of the Immigration and Nationality Act - nonimmigrant overstay.
APPLICATIONS:	Asylum; Withholding of removal; and Withholding of removal under the Torture Convention; and Voluntary departure.

ON BEHALF OF RESPONDENT:

Julie Mulaney
69 South Mulgar Avenue
Suite 204
Mount Kisko, New York 10549

ON BEHALF OF DHS:

Robert K. Bingham
Special Counsel
Hartford, Connecticut

ORAL DECISION OF THE IMMIGRATION JUDGE

Introduction

The respondent is charged in the Notice to Appear with being a native and citizen of Nepal, who is a non-immigrant overstay. The respondent admitted the allegations and conceded the charges. Accordingly, the Court finds that removability has been established by clear and convincing evidence.

The respondent declined to designate a country of removal and Nepal was directed. The respondent applied for relief in the form of asylum and withholding of removal.

STATEMENT OF THE FACTS

The respondent states that she was born in the village of Lodhing in the Solakhumba of Nepal, on May 5, 1968. She states that she is an ethnic Sherpa. She did not know anything about her caste in Nepal. However, she stated that her parents were probably the wealthiest people in their village of around 400 people and that they owned a lot of land in the area. The respondent stated that she had about eight years of education.

The respondent married her husband in February of 1995. She states that she lived both in her village as well as in her husband's village, which was about a one hour walk. She stated that her husband's family was also quite wealthy and that they owned a lot of land around their village.

She testified that her husband taught in a government school in the village teaching Nepali and Buddhist religion until around March of 2001. When confronted, based on an article, she also stated that her husband had a trekking and restaurant business and that he is "Incarnate Lama."

The respondent states that she was a member of the Nepali Congress Party at her village level and that she worked with women in her village to get work, health and village projects and did some sort of teaching women at home. She stated that she had little contact with the local or district level. The respondent was asked what the principals of the part were and she stated that it was to do good things in the village. She stated that her brother was the district chairman. She also stated that her husband was some sort of village chairman, but it is unclear what village it was.

The respondent's application states that in 2004, she and her husband were forced to leave his village, because the Maoist threatened her husband. She writes in her application that she went with her children to her village and her husband went to Kathmandu.

She then writes in her application that in January [*handwritten insert*] 21, 2002, her uncle was captured, tortured and killed by the Maoist. She

stated that it was to make an example of them. She states that her husband had quit or was no longer involved in the Nepalese Congress Party, but they still received harassments and threats from the Maoists.

She states that on January 30, 2002, 12 or 13 Maoist came to her house in her village and demanded money or manpower. She states that she, her husband and her parents were at home. She stated that the Maoist told her that they had to pay the money or help them and stated that they would require to help them if they did not comply. She wrote in her application or she testified that her husband said that they would help the Maoist and that they said they would return or else they would kidnap them.

The respondent maintains that the Maoists focused on teachers and those involved in politics, because those were considered people with money. She did state that the Maoists asked for money for anyone in the area that was perceived as wealthy including her parents, who paid the Maoist. She states that she spoke with the police about this extortion request. She also stated that the Maoist did not like the projects that Nepali Congress did and that the Maoists did not like any kind of political parties. She maintains that they could not pay the Maoist demands because they did not have that much money and she did not support them.

The respondent states that the Maoist returned to their house on April 5, 2002 and severely beat her husband, because they wanted him to join them or give them money. She stated that she was pres-

ent when her husband was beaten. She stated that they told them that they would return on November 25, 2002 and if they did not have the money, they would take her away. The respondent maintains that her husband did own property but that the Maoist collected rent on the property. She stated that her husband then went to Kathmandu. She stated that her husband was hiding in a Buddhist monastery, where he was apparently studying to be a Buddhist priest or monk.

The respondent stated that she remained in her house and thought that the Maoists would not harm her, despite what they did to her cousin. She thinks that they returned at night and dragged her into the forest. She states that they asked her about her husband and why he was in Kathmandu. She states that she walked for about 10 or 11 hours and was at the camp for about 24 hours and was returned the next day. She states that they returned her because she said she would cooperate with the Maoists. She claims that she was sexually assaulted. She states that when she was released, she was told that she would be killed if she told the police.

The asylum application indicates that she walked for two days to a jungle camp, was at the camp for two or three days. She apparently told the Asylum Officer approximately the same thing. The respondent stated that the asylum application was incorrect.

The respondent then states that she walked home and gathered her children and then after two or three days went to Kathmandu. She claims that

after arriving in Kathmandu, she received a letter and took to the police. She also states that she told the police what happened to her when she was abducted by the Maoist.

The respondent states that she last heard from the Maoist in 2002. She stated that she applied for a visa at the American Embassy and received the visa in June 3, 2003. She stated that a friend filled out the visa application in English and that she told the friend to write on her visa application that she was coming to the United States because of her problem with the Maoists. She stated that her husband had been refused a visa and she was lucky to get one. She stated that she waited to get a visa, because she needed someone to accompany her to the United States.

She stated that when she was in Kathmandu, she cared for her children and her husband was studying to be a Buddhist priest. He lived in a monastery.

She stated that if she were to return to Nepal, the Maoists would kill her. She states that the situation has worsened in Nepal, because political leaders have ben jailed and that she really does not fear the government. She states that she went to a government rally, a protest rally, in the middle of May of 2005.

The Court also reviewed various letters submitted by the respondent. Some of those letters state that the respondent was a member of a Nepali Congress Party, Solakhumba District. There is another letter dated April of 2001 from a police station in Kathmandu. It states that the respondent's husband has been living in Kathmandu since 2000 and

that he is a highly respected Buddhist priest and a well-to-do person and has plenty of ancestral property in that district. It states that Maoist rebels have been threatening him by correspondence and phone calls demanding hundreds and thousands of rupees and that if he did not provide the money, they might kill him and his wife and two children and destroy their property. It mentions that an aborted attempt on their house on 1999.

The respondent also provided another, what appears to be a form letter from the Maoist from November of 2002 addressed to the respondent at her home in the village demanding 12,000 rupees. There is another article written allegedly about the respondent's husband from July of 2001, calling him a religious leader and social worker, who had to leave the village after the Maoist began to collect donations. It describes him as an active supporter of the Nepalese Congress Party.

The Court also reviewed the background materials concerning country conditions in Nepal. The documents state[s] that there has been a Maoist insurgency since 1996, which has prevented new elections. During the year, Maoists continued their campaign, torturing, killing, bombing, forcing conscripting children, extorting, forcing closures of schools and businesses and committing other serious human rights abuses. Approximately 4,074 civilians were killed. The report states that the Maoists continue to kill and torture politicians, civilians, and journalists. The Maoists abducted approximately 665 persons during the year, partic-

ularly focusing on students and teachers to indoctrinate them.

Generally, the Maoists most often target political leaders, local elites, teachers, civil servants, and suspected informers. Maoists regularly extorted money from businesses and workers, and when they refused to pay, Maoists incrimination was almost always violent.

STATEMENT OF THE LAW

To qualify for asylum under Section 208, the respondent must establish that she is a refugee within the meaning of Section 101(a)(42) of the Act. The definition of a refugee includes a requirement that the respondent demonstrate either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In analyzing the respondent's claim, the Court would be guided by the regulations found in 8 C.F.R. Section 1208.13 (b).

CREDIBILITY

The Asylum Officer, *see* Exhibit 6 for identification, did not find the respondent to be credible, based on some sort discrepancy about a dog and her involvement with the Nepalese Congress Party.

The Court did not find the issue about the dog to be particularly material or that relevant to her case. However, the Court does find[s] and sort of agrees with the Asylum Officer that the respondent

really did not know much about the Nepalese Congress Party. She apparently told the Asylum Officer or was not very forthcoming about the nature of her activity with the party.

Before the Court, the respondent really did not know much the party and its platform or what it stood for. She stated that the party wants to do good in the village. The Court did not find the respondent's knowledge of the party to be particularly apparent. However, the Court does not find this to be, in itself, a reason to deny the respondent's application.

The Court also found a minor discrepancy involving whether her cousin versus her uncle was killed. The Court does not find that there is some discrepancy regarding that part of her testimony.

The Court also found that the respondent's explanation to be rather puzzling that she did not know what caste she was in. Again, the Court does not find this, in itself, to find her not credible.

The Court also found rather puzzling and certainly not very credible her statement that she told the Embassy on her application that she was coming to the United States to flee problems with the Maoists. The Court again finds it hard to believe that the Embassy would issue her a visitor's visa if she was fleeing the country, fleeing persecution, being that a visitor's visa would be issued only if there is a clear intent to return to Nepal. The Court finds it rather hard to believe that the Embassy would have issued her the visa based on that statement.

The Court finds the major credibility issue, her explanation about what happened to her, when she was allegedly abducted by the Maoists, both in her asylum application and what she told the Asylum Officer. She was forced to walk for two days in the jungle and then held for two or three days by the Maoists and then released. She testified to the Court, however, that she was abducted and walked around ten or 11 hours and was at the camp for one day and then returned the next day. The Court finds this to be a significant discrepancy. The Court finds this to be a more significant discrepancy that goes to the heart of her claim.

The Court finds that the discrepancy about her abduction coupled with the other noted discrepancies result in a finding that her testimony is not credible. The Court considered the credibility factors in the aggregate.

ANALYSIS AND FINDINGS

The first determination is whether the respondent suffered past persecution. 8 C.F.R. Section 1208.31(b)(1). The first issue is whether she suffered past persecution. The only evidence of past persecution appears to be when she was allegedly abducted. Based on the Court's adverse credibility finding, the Court does not find there to be sufficient credible evidence to show that she was abducted and sexually assaulted.

The next determination is whether the respondent's testimony is credible, whether that is persecution based on one of the five enumerated grounds.

It is clear from the record that the respondent had problem with the Maoists, essentially because she and her husband had money, and were perceived by the Maoists to have money. She did indicate that both she and her husband came from wealthy families and that they owned a lot of property in their respective areas. The respondent maintains that they were targeted because her husband was a teacher and that they were both involved in the Nepalese Congress Party and the respondent testified that as a result, that the Maoists would think that they have money.

It appears, however, that the case always revolves their money. It appears that the Maoists really did not ask anything from the respondent. There is no evidence in the record that the Maoists discussed any sort of political opinion by the respondent or her involvement with the Nepalese Congress Party. The record reflects that the Maoists do use extortion to raise[s] funds and it is clear from the articles and especially the letter to the police report that they were targeted because of wealth.

In analyzing the respondent's case, the Court finds that the Board of Immigration Appeals' *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997), to be on point. In that case, the Board analyzed similar extortion case from the case in the Philippines. The Board held that the respondent must produce evidence from which it is reasonable to believe that the harm would be motivated, at least in part, by an actual or imputed political ground.

Similar to *Matter of T-M-B-*, it appears that the imposition of this extortion relates to the respondent's ability to pay. The respondent indicates that anyone who is perceived to have money in her area was a subject of extortion demands, including her parents. There is no evidence that the Maoist treated the respondent differently. Her mother is in the same situation.

The Court does find any evidence in the record to show that political opinion was a part of this. There is no evidence that the Maoists requested that the respondent to curtail any political activities or stop any political activities.

While the Court finds that the actions that occurred to the respondent occurred to be possible based on country conditions, they are certainly reprehensible, the Court finds the respondent's claim is not based on political opinion. Criminal extortion efforts do not constitute persecution based on political opinion.

Accordingly, the Court finds that the respondent has failed to establish a well-founded fear of future persecution based on political opinion. Accordingly, the Court finds that the respondent has failed to establish asylum eligibility based on past persecution.

The next issue is whether the respondent has established a well-founded fear of future persecution, under 8 C.F.R. Section 1208.13(b)(2).

As stated previously, the Court finds that any harm that could occur to the respondent would not be based on her political opinion. The next issue is whether the respondent's fear of persecution is rea-

sonable. The respondent states that she does not fear the government, despite the recent government crackdown. She states that she fears the Maoists. The issue then is whether that fear if [?] well-founded. It appears that the respondent did relocate to Kathmandu. She stated that she had not heard anything from the Maoists since the abduction in November of 2002. There is no evidence that the Maoists are still looking for them in Nepal.

The Court does not find that there is sufficient evidence to show that the respondent, right now, has a reasonable fear of persecution, being that there is no evidence that the Maoists have still continuing to target the respondent. Accordantly, the respondent's application for asylum under Section 208 of the Act is denied.

Since the respondent has failed to meet the well-founded fear standard, it follows that she fails to meet the clear probability standard for withholding of removal. Accordingly, her application for withholding of removal under Section 241(b)(3) of the Act is denied.

The next issue is whether it is more likely than not that the respondent would be tortured if returned to Nepal by anyone acting on behalf of the Nepalese government. The Court does not find there is sufficient evidence in the record to show that it is more likely than not that she would be tortured by the Nepalese government or anyone acting with the acquiescence of that government. Accordingly, the application for withholding of removal under the Torture Convention is denied.

Since the respondent was placed into removal proceedings within a year after her arrival in the United States, she is barred from post-merits voluntary departure. Accordingly, she must be ordered removed to Nepal.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum under Section 208 is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241(b)(3) of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Torture Convention is denied.

IT IS FURTHER ORDERED that the respondent be removed to Nepal.

MICHAEL W. STRAUS
Immigration Judge

182 (2)

FEB 25 2011

No. 10-840

In the Supreme Court of the United States

KANCHHI MAYA SHERPA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Board of Immigration Appeals' discretionary decision to deny petitioner's untimely motion to reopen her immigration proceedings.

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In the Supreme Court of the United States

No. 10-840

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v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 17a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2010. A petition for a writ of certiorari was filed on December 22, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demon-

strates that she is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines "refugee," in relevant part, as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition to the discretionary relief of asylum, mandatory withholding of an alien's removal from the United States is available "if the Attorney General decides that the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The alien bears the burden of establishing her eligibility for asylum or withholding of removal. 8 C.F.R. 208.13(a) and .16(b).[1]

Additionally, an alien who fears torture if removed to a particular country may obtain protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through Department of Justice regulations. See 8 C.F.R. 208.16-208.18; see also Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, Pub. L. No. 105-277, 112 Stat. 2681-2822 (8 U.S.C. 1231 note). To obtain protection under the CAT, an alien must dem-

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[1] These requirements are now codified at 8 U.S.C. 1158(b)(1)(B)(i) and 1231(b)(3)(C), which were added to the INA by Sections 101(a)(3) and (c) of the REAL ID Act of 2005, Pub. L. No 109-13, 119 Stat. 231, 303-304. Because petitioner's asylum application was filed before the May 11, 2005, effective date of the REAL ID Act, C.A. App. 318, the provisions of that Act do not apply to this case. See REAL ID Act § 101(h)(2), 119 Stat. 305.

onstrate that it is more likely than not that she would be tortured, by or with the acquiescence of the government, in the country of removal. 8 C.F.R. 208.16(c)(2); 8 C.F.R. 208.18(a)(1).

2. Petitioner is a native of Nepal who entered the United States in 2003 on a nonimmigrant visa, with the period of authorized stay set to expire on February 4, 2004. Pet. App. 18a; Gov't C.A. Br. 4. Following that expiration date, petitioner conceded her removability, but sought asylum, withholding of removal, and relief under the CAT. Pet. App. 18a, 30a. Petitioner claimed that Maoist rebels had persecuted her in Nepal because of her husband's membership in, as well as her own support of, the Nepali Congress Party. *Id.* at 19a-23a.

a. After an evidentiary hearing, the immigration judge denied relief. Pet. App. 30a. The immigration judge first concluded that petitioner's testimony was not credible. *Id.* at 26a. Petitioner's "major credibility issue" was a "significant discrepancy" in her description of an alleged abduction by Maoists; in her asylum application and interview with an asylum officer, she had claimed a much more prolonged abduction than she had testified to at the hearing. *Ibid.* The immigration judge also found a number of more minor inconsistencies: petitioner "really did not know much about the Nepalese Congress Party"; she lacked knowledge regarding what caste she was in; she was inconsistent about which relative of hers had allegedly been killed by the Maoists; and her claim that she had stated in applying for her nonimmigrant U.S. visa that she was fleeing persecution (a statement that would have rendered her ineligible for such a visa) was "hard to believe." *Id.* at 25a. All of these discrepancies, taken together, led the immigration judge to find petitioner not to be credible. *Id.* at 26a.

The immigration judge then held that petitioner had not satisfied the criteria for asylum, withholding of removal, or CAT protection, and he ordered her removal to Nepal. Pet. App. 30a. As to asylum, the immigration judge determined that petitioner's previous problems with Maoists were "[c]riminal extortion" of money due to her relative wealth rather than "persecution based on political opinion," and that there was insufficient evidence that she had a reasonable fear of persecution by Maoists if she were to return to Nepal. *Id.* at 27a-29a. Those same findings also led the immigration judge to deny withholding of removal. *Id.* at 29a. And the immigration judge additionally denied CAT relief because there was insufficient evidence "to show that it is more likely than not that [petitioner] would be tortured by the Nepalese government or anyone acting with the acquiescence of that government." *Ibid.*

b. Petitioner appealed to the Board of Immigration Appeals (Board), which adopted and affirmed the immigration judge's decision. C.A. App. 185. The Board denied petitioner's motion to remand in order for her to present testimony from her husband. *Ibid.* The Board concluded that remand was not warranted, as petitioner "failed to explain either how her husband's testimony would change the Immigration Judge's adverse credibility finding or why her husband failed to provide a statement or an affidavit in support of her applications for relief during the proceedings before the Immigration Court." *Ibid.* Petitioner did not seek judicial review of the Board's decision.

3. Petitioner subsequently filed a series of three motions to reopen her immigration proceedings. In general, an alien may file only one motion to reopen, which must be filed within 90 days of the entry of the final ad-

ministrative decision of removal. 8 U.S.C. 1229a(c)(7)(A) and 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). There is an exception to those limitations, however, if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). "The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," subject to regulatory requirements. 8 C.F.R. 1003.2(a). "The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." *Ibid.*

a. Petitioner filed her first motion to reopen approximately six months after the Board's decision. C.A. App. 139-140. The Board denied the motion as untimely. *Id.* at 140.

Petitioner argued for equitable tolling of the 90-day limitations period based on allegations of ineffective assistance of counsel, but the Board determined that "counsel did not commit any error in this case." C.A. App. 139. Petitioner also argued for an exception to the 90-day period on the ground of changed circumstances, claiming that Maoists were now part of the Nepalese government. *Id.* at 140. The Board first observed that the immigration judge had made an adverse credibility finding regarding petitioner's claims of Maoist persecution and concluded that "even if [petitioner] established changed country conditions, * * * this cannot alter her asylum and withholding claims based on facts found not to be credible." *Ibid.* The Board additionally concluded that the documents petitioner had submitted "fail[ed] to

establish" that she "has a well-founded fear of persecution by the Maoists in Nepal, given that her testimony regarding her past activities and claimed harm was found not credible, and she has not established that she falls within one of the groups targeted by the Maoists." *Ibid.* Petitioner did not seek further review of the Board's decision.

b. Over seven months later, petitioner filed a second untimely motion to reopen to seek CAT relief based on changed country conditions, claiming that various letters showed that the Maoists were looking for her and were threatening and demanding money from her parents. C.A. App. 104. The Board denied the motion, which it noted was both untimely and successive. *Ibid.* (citing 8 C.F.R. 1003.2(c)(2)). The Board observed that petitioner had made claims "similar" to those in her motion to reopen "during proceedings before the Immigration Judge" and had been deemed not credible. *Id.* at 104. It further observed that petitioner's parents had been able to escape the Maoists and that news articles submitted by petitioner gave "no indication" that the Maoists, who had joined the government, "have been responsible for, or acquiesced to, the torture of any particular person or group." *Ibid.*

Petitioner sought judicial review in the court of appeals. *Sherpa* v. *Mukasey*, 301 Fed. Appx. 19 (2d Cir. 2008). The court affirmed, concluding that the Board had not abused its discretion in denying the motion to reopen. *Id.* at 20. The court reasoned that, because petitioner had not demonstrated government-sponsored Maoist torture, she had failed to show how her claimed change in country conditions "was, in itself, material." *Ibid.* "Moreover, in light of the [immigration judge's] adverse credibility determination, the [Board] reason-

ably declined to credit the letters [petitioner] submitted, allegedly from her parents and the Maoists, indicating that the Maoists were searching for [petitioner] and her husband." *Ibid.* (citing *Qin Wen Zheng* v. *Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007)).

c. Approximately eight months later, petitioner filed a third motion to reopen, styled as a motion to reopen and reconsider, again seeking CAT relief. C.A. App. 10-12.[2] She claimed that the Maoists had carried on with persecution despite signing a peace accord and joining the government; that the Maoists continued to threaten her through her parents; and that the Maoists had beaten her father while inquiring about her. *Id.* at 11.

The Board denied the motion. Pet. App. 7a-9a. Insofar as the motion sought reconsideration of the previous Board order, the Board denied it as untimely. *Id.* at 7a-8a. The Board then observed that the documents submitted in support of the motion to reopen "are not authenticated and have little indicia of reliability, particularly in light of the adverse credibility finding made by the Immigration Judge in this case, and affirmed by this Board on appeal." *Id.* at 9a (citing *Qin Wen Zheng*, 500 F.3d 143). It concluded that the motion did not establish changed country conditions warranting an exception to the time and number limitations on motions to reopen. *Ibid.*

The court of appeals affirmed. Pet. App. 1a-4a. The court concluded that petitioner's motion was "indisputably" untimely and successive, and that the Board "did not abuse its discretion in finding that she failed to establish changed country conditions excusing her un-

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[2] The motion to reopen reprinted in the petition appendix, Pet. App. 10a-16a, is petitioner's second motion to reopen.

timely filing." *Id.* at 3a. The court concluded that the Board "properly relied on the immigration judge's underlying adverse credibility determination to reject her documentary evidence as insufficient to establish changed country conditions." *Ibid.* (citing *Qin Wen Zheng*, 500 F.3d at 147-148). It further stated that "[i]ndeed, the [Board] reasonably applied the doctrine *falsus in uno, falsus in omnibus*, in rejecting [petitioner's] unauthenticated and unreliable affidavits." *Id.* at 4a (citing *Siewe* v. *Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007)). "Moreover," the court reasoned, "the record does not indicate that the [Board] failed to consider any of the evidence [petitioner] submitted." *Ibid.* (citation omitted).

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred by reciting the *falsus in uno, falsus in omnibus* (false in one thing, false in all things) maxim in affirming the Board's decision. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. This case is in any event an unsuitable vehicle for addressing the question presented. Further review is unwarranted.

1. The court of appeals correctly concluded that the Board did not abuse its discretion in denying petitioner's third untimely motion to reopen her immigration proceedings. In contending otherwise, petitioner overlooks the procedural posture of the case. This Court has explained that motions to reopen are "disfavored" and that the Board has "'broad discretion' to grant or deny such motions." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (citation omitted); see 8 C.F.R. 1003.2(a). The Court has analogized such a motion to "a motion for a new trial in

a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). And the Court has recognized that "[i]f INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case," and that "[g]ranting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *Id.* at 108 (citation omitted).

The Board here permissibly exercised its discretion to deny petitioner's repeated, similar motions to reopen. Petitioner's motions all related to her original claim of persecution by Maoists. The immigration judge, citing the cumulative impact of a number of discrepancies, found petitioner's testimony regarding Maoist persecution not to be credible. Pet. App. 26a. The Board affirmed and adopted that conclusion in the original administrative appeal, C.A. App. 185, and petitioner did not seek judicial review of that determination. The Board is not required at this point to reopen proceedings based on an untimely motion presenting new testimony and unauthenticated documents concerning a matter as to which an alien has been deemed not credible. See, *e.g.*, *Le Bin Zhu* v. *Holder*, 622 F.3d 87, 92 (1st Cir. 2010) (within Board's discretion to give little weight to unauthenticated document submitted in support of alien's motion to reopen where the Board's decision "is supported by [a prior] adverse credibility finding"); *Zhang* v. *Mukasey*, 543 F.3d 851, 855 (6th Cir. 2008) (within Board's discretion, "[a]gainst [the] background" finding alien "not credible and her documents fraudulent," to discount letter by petitioner's best friend).

2. Petitioner focuses (Pet. i, 6-8) on the court of appeals' mention of the *falsus in uno, falsus in omnibus* maxim and argues that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Kadia* v. *Gonzales*, 501 F.3d 817 (2007). The court in *Kadia* vacated a removal order and remanded for further proceedings in circumstances in which an immigration judge "had failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand." *Id.* at 821. The court concluded that the immigration judge had, "[i]n effect, * * * applied the discredited doctrine of *falsus in uno, falsus in omnibus*," which the court (citing several authorities) characterized as an "absolutely false maxim of life." *Ibid.* (quoting 3A John Henry Wigmore, *Evidence in Trials at Common Law* § 1008, at 982 (James H. Chadbourn ed., rev. ed. 1970)).

Petitioner's reliance on *Kadia* is misplaced. First of all, the court in *Kadia* was *directly* reviewing a credibility determination, rather than reviewing the denial of a motion to reopen. See 501 F.3d at 819-820; see also *Meçe* v. *Gonzales*, 415 F.3d 562, 576 (6th Cir. 2005) (observing, on direct review of asylum denial, in pre-REAL ID Act case, that "[a]n adverse credibility finding must be based on issues that go to the heart of the applicant's claim") (citation omitted). The case therefore neither presented nor addressed the question here: how an adverse credibility finding, affirmed by the Board and never presented for judicial review, might factor into the Board's subsequent exercise of discretion to deny a third untimely motion to reopen.

Second, *Kadia* did not concern a situation, like in this case, where an alien's inconsistencies were *not* "trivial," "innocent," or "harmless," but instead went to the heart

of her persecution claims. 501 F.3d at 821. As previously discussed, the immigration judge here concluded, based on a combination of suspicious statements, that petitioner was not credible in claiming persecution by Maoists. Pet. App. 26a. Petitioner's self-authenticated statements and documents in her motions to reopen made contentions similar to those as to which petitioner had already been discredited. As the Seventh Circuit explained in a case discussing *Kadia*, it "is only the *automatic* inference from disbelief in one part of a witness's testimony to disbelief in the rest that the modern cases reject," and it is the job of the "trier of fact" (in this case, the immigration judge) to "consider whether * * * particular falsehoods in a witness's testimony so undermine his credibility as to warrant disbelieving the rest of his testimony." *United States* v. *Edwards*, 581 F.3d 604, 612 (2009), cert. denied, 130 S. Ct. 1301 (2010). Even in *Kadia*, the Seventh Circuit acknowledged that some "slips," "whether or not they go to the core of the witness's testimony," could establish "that the witness is a liar or his memory completely unreliable." 501 F.3d at 822.

Third, the Second Circuit has recognized "limits" on the *falsus* rationale that are generally consistent with the Seventh Circuit's view and demonstrate that its application requires a case-by-base inquiry. *Lin* v. *Gonzales*, 445 F.3d 127, 133 (2d Cir. 2006). The Second Circuit has stated that "while an [immigration judge's] application of the maxim *falsus in uno, falsus in omnibus* may *at times* be appropriate, an applicant's testimonial discrepancies—and, at times, even outright lies—must be weighed in light of their significance to the total context of his or her claim of persecution. * * * Testimonial inconsistencies are not sufficient as the sole basis

for an adverse credibility finding where the inconsistencies do not concern the *basis for the claim of asylum or withholding*, but rather matters collateral or ancillary to the claim." *Zhong* v. *United States Dep't of Justice*, 480 F.3d 104, 127 (2007) (first emphasis added, citations omitted, and internal quotation marks omitted); see *Siewe* v. *Gonzales*, 480 F.3d 160, 170-171 (2d Cir. 2007) ("False evidence that is wholly ancillary to the alien's claim may, in some circumstances, be insufficient by itself to warrant a conclusion that the entirety of the alien's uncorroborated material evidence is also false.") The court of appeals' context-dependent decision to cite the maxim approvingly in this particular case accordingly does not warrant review.

3. Even assuming that the result in this case were inconsistent with *Kadia*, this case would not provide a suitable vehicle for addressing reliance upon the *falsus* rationale in immigration proceedings. The court of appeals' mention of that point was not outcome-determinative in this case, because its judgment is supported on an alternative ground. In addition to discussing petitioner's adverse credibility determination, the court stated that "[m]oreover, the record does not indicate that the [Board] failed to consider any of the evidence [petitioner] submitted." Pet. App. 4a. That statement is properly construed as an alternative holding recognizing that the Board permissibly exercised its discretion to deny the motion to reopen based on its evaluation of the evidence. See *id.* at 9a (conclusion of Board that petitioner's motion "does not establish changed country conditions that would warrant an exception to the limitations on motions to reopen").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011